# Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)(NCVC)-2240–12 OF 2016
IDRUS HARUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
17 APRIL 2018

*Contract — Specific performance — Agreement — Sale and purchase agreement — Parties in discussion to enter into sale and purchase agreement — Property had restriction of interest — Consent of state authority must be obtained before property could be sold, leased or transferred — Potential purchaser advanced earnest deposit to vendor — Vendor accepted but returned earnest deposit to potential purchaser before obtaining consent of state authority — Whether there was contract concluded — Whether contract binding*

The appellant was the registered owner of piece of land ('the property') which had a restriction of interest that it could not be sold, leased or transferred without the approval or consent of the state authority. Despite being aware of this restriction, the respondent offered to buy the property and the appellant agreed to sell. The respondent paid the earnest deposit to the appellant. Their correspondences were issued with a term 'subject to contract' and 'there shall be no binding contract between the parties until formal agreements are executed'. While preparing the relevant documents for the sale and purchase agreement ('SPA') and before the consent of the state authority could be obtained, the appellant returned deposit cheque without executing the agreements and without giving any reasons. At the High Court, the respondent sought specific performance against the appellant. Before the appellant filed its defence, the respondent successfully obtained summary judgment against the former, pursuant to O 81 of the Rules of Court 2012 ('the ROC'). Hence, the present appeal. The issues that arose for the court's determination were: (a) whether there was a concluded contract between the parties; (b) whether a specific performance under O 81 of the ROC could be granted in a sale and purchase agreement which was subject to a condition precedent ie the state authority's consent; and (c) whether the respondent's application under O 81 of the ROC was fatally flawed for failing to set out or attach minutes of judgment sought under O 81 r 2 of the ROC.

**Held**, dismissing the appeal with costs:

(1) In order to determine whether there was a concluded contract between the parties, the ingredients of a contract must be present. When the arrangement was 'subject to contract', such as in the instant case, the

court could always scrutinise the correspondence between the parties to construe whether the contract had finally been made. In the present case, all the elements of a binding contract were already there. The parties, the offer and acceptance, the property, the price and the terms had been identified with sufficient certainty. A valid and enforceable contract had materialised between the parties (see paras 20–21).

(2) A condition precedent in a contract was not an impediment for an order of specific performance to be granted. It was merely a conditional contract which will no longer be conditional if the conditions precedent have been fulfilled. The respondent was just seeking the appellant to comply and continue with the agreements and to apply for the state authority's approval. In the event the state authority refused to give its approval, the contract would surely come to an end (see para 33).

(3) The rationale for such a requirement to set out the relief of the judgment sought to attach minutes of judgment in respect of summary proceedings under O 81 of the ROC is to ensure that the final order could be speedily, promptly and expeditiously issued before the court upon the termination of the proceedings in the appellant's favour. The respondent had sufficiently set out the reliefs of the judgment sought which were supported by the affidavit containing all the documents and details of parties' obligation under the agreement. This was not a case where the applicant 'has put it into the hands of the court how the contract is to be carried out' (see para 37 & 40).

**[Bahasa Malaysia summary**

Perayu adalah pemilik berdaftar sebidang tanah yang ('hartanah') yang mempunyai sekatan kepentingan yang tidak boleh dijual, dipajak atau dipindahkan tanpa kelulusan atau persetujuan pihak berkuasa negeri. Walaupun sedar akan sekatan ini, responden menawarkan untuk membeli hartanah tersebut dan perayu bersetuju menjualnya. Responden membayar wang cengekeram kepada perayu. Surat-menyurat mereka dikeluarkan dengan istilah 'tertakluk pada kontrak' dan 'tidak akan ada kontrak mengikat antara pihak-pihak sehingga perjanjian rasmi dimeterai'. Semasa menyediakan dokumen berkaitan bagi perjanjian jual beli dan sebelum persetujuan pihak berkuasa negeri diperolehi, perayu mengembalikan cek deposit tanpa melaksanakan perjanjian dan tanpa memberikan apa-apa alasan. Di Mahkamah Tinggi, responden memohon pelaksanaan spesifik terhadap perayu. Sebelum perayu memfailkan pembelaannya, responden berjaya mendapatkan penghakiman ringkas terhadap perayu bawah A 81 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Oleh itu, rayuan ini. Isu-isu yang timbul untuk pemutusan mahkamah adalah: (a) sama ada terdapat kontrak yang dimeterai antara pihak-pihak; (b) sama ada pelaksanaan spesifik bawah A 81 KKM boleh diberi dalam perjanjian jual beli yang tertakluk pada syarat terdahulu iaitu persetujuan pihak berkuasa negeri; dan (c) adakah permohonan

responden bawah A 81 KKM adalah kecacatan yang menjejaskan kerana gagal menetapkan atau melampirkan minit penghakiman yang dipohon bawah A 81 k 2 KKM.

**Diputuskan**, menolak rayuan dengan kos:

(1) Untuk menentukan sama ada terdapat kontrak yang dimeterai antara pihak-pihak, inti pati kontrak mestilah wujud. Apabila aturan 'tertakluk kepada kontrak', seperti dalam kes ini, mahkamah boleh meneliti surat-menyurat antara pihak-pihak untuk membuktikan sama ada kontrak itu dimeterai. Dalam kes ini, semua inti pati kontrak mengikat sedia ada. Pihak-pihak, tawaran dan penerimaan, harta, harga dan syarat telah dikenal pasti dengan kepastian yang cukup. Kontrak yang sah dan dikuatkuasakan telah dimaterialisasikan antara pihak-pihak (lihat perenggan 20–21).

(2) Syarat terdahulu dalam kontrak bukan halangan bagi satu perintah pelaksanaan spesifik diberi. Ini cumalah kontrak bersyarat yang tidak akan lagi bersyarat jika syarat terdahulu telah dipenuhi. Responden hanya memohon pada perayu untuk mematuhi dan meneruskan perjanjian dan memohon kelulusan pihak berkuasa negeri. Sekiranya pihak berkuasa negeri enggan memberikan kelulusannya, kontrak pasti akan berakhir (lihat perenggan 33).

(3) Rasional bagi syarat untuk menyatakan relief penghakiman yang dipohon untuk melampirkan minit penghakiman berkenaan dengan prosiding ringkasan di bawah A 81 KKM adalah untuk memastikan perintah akhir dapat dikeluarkan dengan cepat, segera dan serta merta di hadapan mahkamah selepas tamat prosiding berpihak pada perayu. Responden telah dengan cukup menyatakan relief penghakiman yang dipohon yang disokong oleh afidavit yang mengandungi semua dokumen dan butir-butir kewajipan pihak-pihak di bawah perjanjian. Ini bukan kes di mana pemohon 'telah memasukkan tangannya dalam mahkamah tentang bagaimana kontrak tersebut hendaklah dilaksanakan' (lihat perenggan 37 & 40).]

**Notes**

For a case on agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) para 7374.

**Cases referred to**

*Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

*Chin Tai v Siow Shiow and Ors* [1971] 1 MLJ 61, FC (refd)

*Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746, CA (refd)

A *Dato' Yeoh Kian Hin v Wijaya Astana Sdn Bhd & Ors* [2002] 7 MLJ 685; [2002] 1 CLJ 68, HC (refd)
*Deutsche Bank (Malaysia) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068, FC (refd)
*Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4
B MLJ 654, CA (folld)
*Halimah bt Abdul Rahman v Fatimah bt Abdullah* [1976] 2 MLJ 64, FC (refd)
*MMI Industries Sdn Bhd v Ler Sin Industries Sdn Bhd* [2010] 5 MLJ 71, CA (refd)
*Masters v Cameron* (1954) 91 CLR 353, HC (refd)
C
*Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd* [2005] 6 MLJ 132, HC (refd)
*Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535, CA (refd)
D *Saudagar Singh v Nazeer* [1978] 3 AUER 817, Ch D (refd)
*Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 (refd)
*Waheed Baig v Bangi Lakshmamma and Ors, SC* (refd)

**Legislation referred to**

E Rules of Court 2012 O 2 r 1, O 14, O 81, O 81 r 2
Specific Relief Act 1950 s 17, 17(a), (b)
Specific Relief Acts 1963 [IND] s 13(a), (b)

**Appeal from:** Civil Suit No JA-22NCVC-128–06 of 2016 (High Court, Johor
F Bahru)

*Yoong How Kiat (HK Yoong) for the appellant.*
*Chan Weng Keng (Julie Lim, Vasanthan & Co) for the respondent.*

G **Zaleha Yusof JCA:**

**[1]** This is an appeal against the decision of the High Court at Johor Bahru which had on 26 October 2016 allowed the respondent's notice of application for an order for specific performance pursuant to O 81 of the Rules of Court
H 2012.

**[2]** The subject matter of this appeal is a piece of land held under HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Johor ('the property'). The appellant is the registed owner of the property. There is a
I restriction of interest on the property that it cannot be sold, leased or transferred without the approval or consent of state authority; and both parties, the plaintiff and the defendant, were aware of this restriction.

**[3]** By a letter dated 15 September 2015, the respondent made an offer to the

appellant to buy the property for RM3m and upon completion of the sale, to rent it back to the appellant to enable the appellant to continuously occupy the property.

**[4]** On 17 September 2015, the respondent paid earnest deposit to the appellant in the sum of RM76,000 being 2% of the purchase price.

**[5]** All these were done through their respective solicitors and their correspondences were issued with a term 'subject to contract' and also 'there shall be no binding contract between the parties until formal agreements are executed'.

**[6]** On 10 May 2016, after eight months of negotiations, the appellant's solicitor forwarded to the respondent's solicitor two copies of the forms for the state authorities' approval to enable the appellant to proceed to apply for the said approval. In the same letter the appellant also requested the respondent to furnish all other relevant documents for the purpose of the said application for approval.

**[7]** On 11 May 2016, the appellant's solicitor had emailed the respondent's solicitor which, inter alia, contained the following:

> We have no further comment on the SPA and TA draft. Kindly proceed to engross of the same, for your client's kind execution. Please let us have the SPA and TA duly executed by your client together with the balance deposit.

**[8]** The respondent's solicitor had duly complied with the appellant's solicitor's letter and on 13 May 2016 had forwarded the following documents to the appellant's solicitor:

(a) four copies of the sale and purchase agreement duly executed by the respondent;

(b) four copies of the tenancy agreement duly executed by the respondent;

(c) two copies of the memorandum of transfer duly signed and sealed by the respondent;

(d) application forms for the state authority's approval; and

(e) respondent's cheque No 310540 dated 13 May 2016 for the sum of RM190,000 being balance of deposit sum.

**[9]** However, on 20 May 2016, the appellant had through their solicitor returned to the respondent's solicitor all those documents together with the deposit cheque without executing the agreements and without giving any reason.

**[10]** Following that, the respondent filed a writ of summons for specific performance against the appellant in this suit. However, before the defence was filed, this notice of application was filed for summary judgment under O 81 of the Rules of Court 2012. The learned judicial commissioner had allowed the application, hence the appeal before us. After perusing the records of appeal and considering the written as well as oral submissions of learned counsels for the appellant and the respondent, we had unanimously allowed the appeal. We shall now give our reasons.

ISSUES

(1) Whether there was a concluded contract between the parties;

(2) Whether a specific performance under O 81 of the Rules of Court can be granted in a sale and purchase agreement which is subject to a condition precedent ie the state authority's consent; and

(3) Whether the respondent's application under O 81 was fatally flawed for failing to set out or attach thereto minutes of judgment sought pursuant to O 81 r 2 of the Rules of Court 2012.

OUR DELIBERATIONS AND DECISION

**[11]** First, we bore in mind that this application which was made under O 81 of the Rules of Court 2012 had the same procedural objective as O 14 of the same Rules in that it provides for a speedy mechanism for obtaining summary judgment without proceeding to a trial. See *Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd* [2005] 6 MLJ 132 at p 140. Hence, the court needs to be satisfied that there is no triable issue before the application can be allowed.

**[12]** So, based on the three issues raised, is there anything which needs to be ventilated in a full trial?

**[13]** We examined all those three issues. On the first issue, it was contended on behalf of the appellant that there was no concluded contract between the appellant and the respondent as the parties had both stated at the outset 'unless and until all terms and condition shall be agreed and the formal sale and purchase agreement and tenancy agreement executed by the parties thereto, there shall be no concluded and binding contract for the same'.

**[14]** Learned counsel for the appellant cited the case of *Masters v Cameron* (1954) 91 CLR 353 which was referred to by the Federal Court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 as follows:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt

with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

**[15]** Learned counsel also cited the more recent decision of the Federal Court in *Deutsche Bank (Malaysia) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068 at pp 1085 and 1100, which explained authorities 'subject to contract' cases, inter alia, as follows:

[20] But consensus ad idem on the terms alone is not enough to form a binding contract. '... in order for a promise to be legally enforceable as a contract, it must be intended to be legally binding, or, as it is more often put, the parties must intended to enter into legal relations ... the earliest judicial support for such a requirement in case law is in the judgment of Atkin LJ in *Balfour v Balfour* [1919] 2 KB 571 ... (Butterworths Common Law Series, The Law of Contract 3rd edn at para 2.169)'. 'The requirement of an intention to create legal relations, additional to the test of bargain, has been repeatedly criticised by academic commentators' (see *BA Hepple* [1970] 28(1) CLJ 122 at p 127; see also *A W B Simpson* [1975] 91 LQR 247 at pp 263–265). But 'since the later nineteenth century, it has become common to say that in addition to the existence of an agreement (generally established through offer and acceptance) and consideration, the formation of an informal contract requires evidence of an 'intention to create legal relations' — that is, there is a substantive additional requirement that the parties intended their agreement to have legally binding force ... Each party agrees not only to the terms of the contract but agrees to it being a contract' (*Formation and Variation of Contracts* by Cartwright at p 55). When parties enter into it, there must be an intention to create legal relations (see *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14; see also *Hui Jia Hao v Perdana Park City Sdn Bhd & Anor* [2012]

A 8 MLJ 385; [2011] 1 LNS 595 *Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics Sdn Bhd* [2006] 6 MLJ 56; [2006] 1 LNS 288 *Ahmad Zaini Japar v TL Offshore Sdn Bhd* [2002] 7 MLJ 604; [2002] 5 CLJ 201 *Jone Theseira v Eileen Tan Ee Lian & Anor* [2002] 4 MLJ 629; [2003] 5 CLJ 171) or in circumstances in which such an intention must be ascribed to them (*Beesley v Hallwood Estates Ltd* [1960] 1
B WLR 549 at p 558; see also Sutton and Shannon on Contracts, 6th Ed at p 54).

...

...

...

C [47] To sum up, without consensus ad idem, there is no concluded contract. But consensus ad idem on just the terms is not enough to form a concluded contract. In addition, there must be the intention to create legal relations and consideration. In most commercial agreements, the court will presume that intention (see *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer*, by John
D Cartwright at p 140), unless there is proof of no such intention. Formality is the exception and not the rule. It does not follow that just because of the expression 'subject to contract' there is no concluded contract. But if formality is by choice, it should be made clear that parties are not bound until the execution of a formal agreement. '... if the intention were that what was agreed in the first instance should
E be the subject to the completion of the formal document, then there was no bargain while that condition remain unfulfilled. Also, of course, there was no agreement if the parties had not agreed on a set of terms at all, either absolutely or conditionally' (*Love and Stewart Ltd v S Instone and Co Ltd* [1917] per Lord Loreburn).

F **[16]** Learned counsel for the respondent, although did not deny the issuance of the letters with the term 'subject to contract' however submitted that the letters were issued so as to enable the parties to finalise all the terms and conditions of both the sale and purchase and tenancy agreements. They were issued with such terms and with an honest intention that neither party shall
G take an advantage of the other until terms and conditions of the sale and purchase and tenancy agreements are finalised. Hence, the said terms were only intended for parties to finalise the terms and conditions of the agreements and it is not terms to be incorporated into those agreements.

H **[17]** He further submitted that what was important was the email dated 11 May 2016 which we had reproduced above. By asking the respondent's solicitor to engross the sale and purchase and tenancy agreements, it was confirmed that all the terms and conditions of both the agreements had mutually crystallised and there was nothing more to add into the terms and
I conditions of the agreements.

**[18]** The respondent further submitted that all the essential ingredients to form a valid and enforceable contract had been reached, as follows:

(a) there was an offer and acceptance between the parties for the purchase of the property and the tenancy agreement;

(b) consideration of RM3,800,000 as purchase price had been agreed by the parties;

(c) all the terms and conditions of the tenancy agreement together with payment of rental between the parties had been concluded; and

(d) the parties had the intention to create a legal relationship to execute the agreements.

**[19]** As such, there was a certainty of parties, certainty of price, certainty of property and intention to create a legal relationship. The appellant was fully aware and that there was nothing more to add into the terms and conditions of the agreements hence, had instructed their solicitors to forward the agreements duly executed by the respondent together with balance deposit sum.

**[20]** Having heard their submissions on the first issue, we were mindful that in order to determine whether there was a concluded contract between the parties, the ingredients of a contract must be present. There must be offer, acceptance, consideration, intention to create legal relation, the capacity of parties as well as certainty of subject matter involved. We were of the view, when the arrangement is 'subject to contract' such as in the instant case, the court can always scrutinise the correspondence between the parties to construe whether the contract had finally been made.

**[21]** As pointed out by the Federal Court in *Charles Grenier*, it is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. In this instant case, the length of period of negotiations which took place for about eight months, in our view, would indicate the intention and seriousness of the parties to conclude the sale and purchase agreement as well as the tenancy agreement. Their months of negotiations culminating in the email dated 11 May 2016 had finally concluded all the terms and their intention to complete the sale and purchase and the tenancy agreements. We therefore agreed with learned counsel for the respondent that all the elements of a binding contract were already there. The parties, the property, the price and the terms had been identified with sufficient certainty. See the decision of this court in *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535.

**[22]** This court in *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 had, inter alia, held:

(1) (per Gopal Sri Ram JCA) There was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant, it had been

A accepted by the plaintiff. There was consideration. There was also certainty of parties, certainty of price and certainty of the property. There were the unequivocal acts of part performance by the plaintiff in the payment of the deposit coupled with the RM5,000 meant for the squatters: *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 followed. There can be a concluded contract even where the B parties contemplate the execution of a more formal document: *Rossiter v Miller* [1878] 3 App Cas 1124 and *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 LIoyd's Rep 25 followed (see paras 7 & 9).

**[23]** So with this instance. The offer and acceptance were there. Parties had C agreed with the consideration of RM3,800,000. The price, the parties, the property had all been ascertained. The terms and conditions had been agreed upon. Even the appellant's solicitor in their email of 11 May 2016 had stated they had 'no further comment on the SPA and TA draft'. This moral conduct of the appellant was, in our view, relevant in determining the issue at hand. So D there was clearly nothing more to be added. Hence we agreed with learned counsel for the respondent that in the circumstances, a valid and enforceable contract had materialised between the parties. Thus our answer to the first issue was in the affirmative.

E

**[24]** Next is the second issue namely whether specific performance can be granted when the contract is subject to a condition precedent ie the state authority's consent.

F **[25]** Learned counsel for the appellant submitted that an order for specific performance can only be granted if there is a certainty that the state authority's consent can be obtained. In this instant case he argued, the state authority's consent is not obtainable as of right. Therefore there is no certainty and this issue becomes at least a triable point of law. He argued that the agreement G cannot be specifically enforced because 'specific performance means performance is certainty' and cited sub-s 17(a) and (b) of the Specific Relief Act 1950 ('the SRA') to support the argument.

H **[26]** Learned counsel for the respondent however submitted that there were many authorities where our apex court had ordered specific performance in cases of land transactions which were subject to state authority's approval. He found support in, inter alia, the following cases:

(a) *Chin Tai v Siow Shiow and Ors* [1971] 1 MLJ 61 (FC);

I (b) *Halimah binti Abdul Rahman v Fatimah binti Abdullah* [1976] 2 MLJ 64 (FC); and

(c) *MMI Industries Sdn Bhd v Ler Sin Industries Sdn Bhd* [2010] 5 MLJ 71 (CA).

**[27]** We had again scrutinised the submissions made by the parties. With due respect, we did not understand how sub-s 17(a) and (b) of the SRA would support the appellant's argument. Subsections 17(a) and (b) merely state:

> 17 Purchaser's right against vendor with imperfect title.
>
> Where a person *contracts to sell* or let certain property, *having only an imperfect title* thereto, *the purchaser* or lessee (except as otherwise provided by this Chapter) *has the following rights*:
>
> (a) *If the vendor* or lessor *has subsequently* to the sale or lease *acquired any interest in the property*, the *purchaser* or lessee *may compel him to make good the contract out of that interest*;
>
> (b) *Where the concurrence of other persons is necessary* to validate the title, and they are bound to convey at the vendor's or lessor's request, *the purchaser* or lessee *may compel him to procure the concurrence*;

**[28]** In India, similar provisions can be found in sub-s 13(a) and (b) of the Indian Specific Relief Acts 1963. The Indian Supreme Court in *Waheed Baig v Bangi Lakshmamma and Ors* on 21 April 2008 in Civil Appeal No 1055 of 2002 at para 10 had explained the subsections:

> 10. The section deals with rights of a purchaser in certain cases, where a person contracts to sell or let certain immovable property having no title or only an imperfect title. These rights enable the purchaser to take action when title of vender is bettered in the circumstances given in this section. The vender is under a duty to prove his title and to convey what he has contracted to convey. The section gives right to purchaser in the event there is a defect in title as enumerated in cll (a)–(d) to compel the vender to convey the title or to secure the concurrence or conveyance or to redeem the mortgaged etc as the case may be.

**[29]** Hence, with due respect to learned counsel for the appellant, s 17 of the SRA is not the authority that can strengthen their argument on this issue. On the contrary, we were inclined to follow the decision of this court in *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654 which at p 667 had made the following determination:

> In *Nik Mohamed Salleh v Tengku Besar Zabidah* [1971] 1 MLJ 73, the Federal Court held that although the beneficiaries of the deceased's estate had no title to the land which they agreed to sell under an agreement they had a spes successionis in the land. As such, the administrator of the deceased's estate was compelled to transfer the whole land to the purchaser, by virtue of the provisions of s 17(a) of the Specific Relief (Malay States) Ordinance 1950 ('the SR (MS) Ordinance') and s 44(1) of the Contracts (Malay States) Ordinance 1950 ('the C(MS) Ordinance'). Section 17(a) of the SRA, which is in pari materia with the same section of the SR(MS) Ordinance, states:
>
> Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:

A (a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of that interest; ...

And s 44(1) of the Contracts Act 1950, which is similar to the same section of the D(MS) Ordinance, provides:

B (1) When two or more persons make a joint promise, the promise may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.

In *Kersah La'usin v Sikin Menan* [1966] 2 MLJ 20 where, under an agreement, the C sole beneficiary sold the land registered under his deceased mother's name, in his judgment *Raja Azlan Shah J* (as His Highness was then) stated:

The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not D disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself as answer to a suit of specific performance by the purchaser; *Brickies v Snell* (1916) 2 AC 599. Actual possession of both the legal estate and any equitable rights are not pre-requisites so long as the vendor is in such a position that when the time for E completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.

What is discernible from the authorities is that a beneficiary to a deceased's estate can enter into a contract of sale of land involving a subject matter which is not subsisting in the sense that the land is still in the deceased's name. However, when F the beneficiary comes to be in a position to pass on the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl 1.1 of the relevant 1992 agreements states that the sale is in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, to our mind, having regard to the fact that the administration of the G deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction is none other than the sale of spec successionis. As specific performance of the 1992 Agreements as prayed for by the plaintiff in the action is an equitable relief, the court will look at the substance rather than the form.

Thus, s 17 of the SRA cannot be used to support a proposition a prayer for H specific performance cannot be granted when there is no certainty of performances. In fact, on the contrary, in our view, the section can be used to support the respondent's claim to compel the appellant to perform its obligation under the agreements.

I **[30]** We found in *Chin Tai*, the restriction endorsed on the issue document of title was that the land was not to be transferred without the express permission in writing of the collector of land revenue. The Federal Court had, inter alia, held that the contract of sale was valid although there could be no transfer by way of specific performance without the permission of the collector

for the transfer being obtained. It was also held that an order may be made for specific performance subject to the permission being granted; if permission is refused, however, the respondents ie the buyer would be entitled to damages. A

**[31]** In *Halimah bt Abdul Rahman*, the respondent agreed to sell a piece of land which she had occupied by virtue of a 'surat putus kecil' which had been cancelled; making it clear in the agreement that she was not its owner but had applied to the state for the land and promising to complete the deal after she obtained title from the state. The appellant paid RM300 towards the purchase price. The respondent had later refused to complete the sale and the appellant thereupon applied for specific performance. It was refused by the High Court on the ground that it offended the Kedah Land Enactment as the land had reverted to the state. The Federal Court, on appeal had allowed the appellant's appeal and held that the contract was clearly enforceable in law as it was a conditional sale to be completed when the vendor's application was approved by the state. B C D

**[32]** In *MMI Industries*, this court had stated that our court has on several occasions ordered specific performance in cases of land transactions where there were conditions precedent to be fulfilled by the vendor. In that case, this court allowed the appeal and granted the order for specific performance of the sale and purchase agreement which was conditional upon the approval of the State Authority of Johor. E

**[33]** Based on those authorities, we were satisfied that a condition precedent in a contract such as in this instant case, is not an impediment for an order of specific performance to be granted. It was merely a conditional contract which will no longer be conditional if the conditions precedent have been fulfilled. The respondent herein was just seeking the appellant to comply and continue with the agreements and to apply for the state authority's approval. In the event the state authority refuses to give its approval, the contract shall surely come to an end. F G

**[34]** Thus our answer to the second issue was also in the affirmative. H

**[35]** On the last issue that the respondent failed to set out or attach minutes of judgment sought pursuant to O 81 r 2 of the Rules of Court 2012, it was the appellant's argument that the failure of the respondent to do so would consequently make the order become imbalanced and/or without legal basis. He submitted, inter alia, there was no purchase price stated, there was no direction for the respondent to make payment and the time limit for payment and there was also no direction for the appellant to pay real property gains tax and goods and services tax as required under the sale and purchase agreement. I

**[36]** The appellant found support, inter alia, in the High Court case of *Dato' Yeoh Kian Hin v Wijaya Astana Sdn Bhd & Ors* [2002] 7 MLJ 685; [2002] 1 CLJ 68.

**[37]** The respondent on the other had argued that the actual intention to attach the application with the minutes of judgment sought is to ensure the final order can be finalised speedily, promptly and expeditiously. Learned counsel for the respondent further submitted that it is not necessary in all the cases to attach with the minutes for judgment sought and it is also not mandatory. Failure to include minutes is not fatal and curable under O 2 r 1 of the Rules of Court 2012. He relied on another High Court case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268.

**[38]** We had no quarrel with both authorities cited by learned counsels for both parties. In fact we found *Sova Sdn Bhd*, was referred to with approval in *Dato Yeoh Kian Hin*. The following was what the learned judge in *Dato Yeoh Kian Hin*, said:

> In my opinion the meaning of the word 'minute' in *Bouvier's Law Dictionary* relied upon by Miss Ayleswary pertains to the 'record' of the court proceedings, ie what had transpired in court made by the judge or registrar in attendance in the form of handwritten notes whereas the word 'minutes' found in O 81 r 2(2) refers to the orders or reliefs sought for but not yet granted or made by the court and are drafted and attached to the O 81 summons as required by r 2(2) on the supposition or assumption that the plaintiff's application will meet with the court's approval. The meaning of the word 'minutes of the judgment or order' in the book *Chancery Practice* (by Daniell's) which was also relied upon by Miss Ayleswary means the minutes of a judgment or order already pronounced by the court.
>
> The rationale for such a requirement in respect of summary proceedings under O 81 of the RHC could well have been to ensure that the final orders can be speedily, promptly and expeditiously issued by the court upon the termination of the proceedings in the applicant's favour. The judge is at liberty to grant or refuse to grant all or any one or more of the attached minutes of judgment. There could well be another important rationale for such a practice or requirement, ie to alert the applicant's opponent concerning the orders of reliefs sought for by the former and to overcome any ambiguity or vagueness in the summons so that the defendant will be able to respond effectively to the applicant's application and to prepare comprehensively his defence and to submit, accordingly, on the date of hearing.
>
> In *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268, the plaintiff sought for an order for specific performance of an agreement and alternatively a rescission of the said agreement and claimed damages and costs pursuant to O 81 of the RHC. The defendant unsuccessfully tried to have the plaintiff's application dismissed with costs for non-compliance with O 81 r 2(2) of the RHC by raising a preliminary objection. According to the defendant, there was a failure on the plaintiff's part to attach to its application the minutes of the judgment sought. *Lim Beng Choon J* (as His Lordship then was) held as follows:

> Turning to the second issue concerning the irregularity of the application, all I can say is that when the applicant is seeking the aid of O 81 there is an option either to set out the reliefs of the judgment sought by the plaintiffs (see O 81 r 2 of the Court of Judicature Act) and it is not mandatory that an application for O 81 must in all cases have the minutes of the judgment sought for attached to the summons although in practice minutes of the judgment are normally attached to the summons. In any event the failure to attach the said minutes to the summons is in my view not fatal; it is curable under O 2 r 1 of the High Court Rules. I therefore cannot accede to the learned defence counsel's contention that the application made by the plaintiff is bad and therefore must be struck out. (Emphasis added.)

I am of the respectful view that the above case is equally applicable to the facts of the instant case where the situation is reversed, ie the decree of specific performance is spelt out in the proposed minutes of the judgment attached to an O 81 summons but not stated in the body of the O 81 summons itself. I also find support for my views in the following excerpt from the *Malaysian Court Practice — High Court*:

ORDER 81

...

(81.1.1) Scope of order

This order provides a procedure similar to O 14 and enables a plaintiff, where there is no triable defence to the action, to obtain summary judgment in an action for specific performance of a contract ... for the sale and purchase of (property) without having to proceed to a full trial ...

This order supercedes the old O 14 of the repealed RSC 1957.

There are procedural differences between O 81 and O 14. The major ones are as follows:

(a) ...

(b) The summons under O 81 must set out or have attached thereto minutes of judgment sought (see r 2(2);

(c) ...

(d) ...

(e) ...

(81.1.3) Specific performance

...

To facilitate the order for specific performance, r 2(2) requires the summons to set out or have attached thereto minutes of the judgment which the plaintiff seeks.

Normally, the first part of the order for specific performance would provide for the agreement to be specifically performed and the second part would encompass other necessary directions for performance which may relate to the terms and conditions of the agreement ...

**[39]** We had perused the reliefs sought by the respondent in the notice of

application which for ease of reference are reproduced now as follows:

(i) Dekri Perlaksanaan Spesifik (Decree for Specific Performance) dikeluarkan terhadap defendan untuk menghekendaki menyempurnakan penjualan hartanah yang dipegang di bawah HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Negeri Johor;

(ii) Dekri Perlaksanaan Spesifik (Decree for Specific Performance) dikeluarkan terhadap defendan untuk mengkehendaki menyempurnakan perjanjian penyewaan hartanah yang dipegang di bawah HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Negeri Johor;

(iii) Kaveat persendirian pihak defendan yang didaftarkan di bawah nombor pendaftaran 16406/2016 dikekalkan sehingga penyelesaian dan keputusan tindakan ini;

(iv) Pendaftar Mahkamah Yang Mulia ini adalah diberikuasa dengan sempurnanya untuk menandatangani borang permohonan untuk kebenaran dari Peguasa Negeri dan Borang Pindahmilik (Borang 14A Kanun Tanah Negara, 1965) dan lain-lain dokumen yang diperlukan;

(v) Sebagai alternative, plaintif berhak untuk mendapatkan gantirugi sebagai gentian kepada dekri perlaksanaan spesifik;

(vi) Gantirugi untuk kerugian yang telah dialami berakibat dari kelewatan defendan untuk menyempurnakan jualan dan penyewaan hartanah tersebut kepada plaintif ditaksirkan dan dibayar oleh defendan kepada plaintif;

(vii) Plaintif berhak untuk menolak wang sebanyak RM114,000 sebagai deposit yang perlu dibayar mengikut perjanjian penyewaan sekiranya mendapati defendan enggan melanjutkan dengan penyewaan daripada harga jualan hartanah tersebut;

(viii) Plaintif berhak untuk membuat permohonan lanjutan untuk menyempurnakan penjualan hartanah tersebut (sekiranya perlu);

(ix) Pengarah Tanah dan Galian Johor adalah perlu memberikan kesan yang sepenuhnya terhadap Perintah Spesifik Perlaksanaan tersebut bagi tujuan untuk mendapatkan kebenaran dari penguasa negeri dan juga memindahkan hartanah tersebut daripada defendan kepada plaintif;

(x) Kos tindakan ini dibayar oleh defendan kepada plaintif berdasarkan pada peguamcara dan anakguam sebanyak RM50,000; dan

(xi) Lain-lain relif Mahkamah Yang Mulia Ini mendapati suai dan manfaat.

**[40]** The rationale for such a requirement to set out the relief of the judgment sought to attach thereto minutes of judgment in respect of summary proceedings under O 81 of the Rules of Court 2012 is to ensure that the final order can be speedily, promptly and expeditiously issued before the court upon the termination of the proceedings in the appellant's favour. See *Dato Yeoh Kian Hin*. The order gives an option either to set out or to attach the minutes. In this

instant case, we found the respondent had sufficiently set out the reliefs of the judgment sought which were supported by the affidavit containing all the documents and details of parties' obligation under the agreement as shown in the reproduced prayers above. As alluded to before, the respondent in this instance was merely seeking the appellant to continue with the execution of the agreement and to apply for the state authority's approval. Prayer (viii) of the notice of application as reproduced above allows the respondent to seek for further order, if needs be. So this is not a case where the applicant 'has put it into the hands of the court how the contract is to be carried out' as in the case of *Saudagar Singh v Nazeer* [1978] 3 AUER 817 (Ch D), another case cited by learned counsel for the appellant.

**[41]** Hence, we again agreed with learned counsel for the respondent and therefore answered the last issue in the negative.

CONCLUSION

**[42]** In the premises of the aforesaid we found there was no merit in this appeal. The appeal was therefore dismissed with costs and the order of the High Court was accordingly affirmed. We also ordered the deposit to be refunded to the appellant.

*Appeal dismissed with costs.*

Reported by Afiq Mohamad Noor